Julian Chong Sook Keok & Anor v Lee Kim Noor & Anor

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-63–10 OF 2021(P)
ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK), HASNAH HASHIM AND MARY LIM FCJJ
19 APRIL 2024

Limitation — Negligence — When cause of action in tort accrued — Appellants bought property from developer — Sale and purchase agreement ('SPA') failed to state whether property was subject to any encumbrances — Several years after occupying property, appellants discovered land on which property stood was charged to developer's financier bank — When bank notified appellants their property would be auctioned off if redemption sum was not paid, appellants sued lawyers who prepared SPA for professional negligence and negligent misstatement — Whether suit against lawyers was time-barred under s 6(1)(a) Limitation Act 1953 — Whether time for purposes of limitation ran not from date of SPA but from time appellants suffered actual damage, ie from date bank exercised its right to foreclose the property — Whether until such time bank took steps to foreclose, appellants' loss or damage was only contingent and not actual

The appellants, husband and wife, sued their lawyers (the respondents) for professional negligence and negligent misstatement for failing to inform them that a property they bought from a housing developer in 2004 was subject to a charge in favour of the developer's financer bank ('Bank Islam'). The sale and purchase agreement ('SPA') drafted by the respondents made no mention of any encumbrance affecting the property. However, several years after occupying the property, the appellants learnt from their neighbours that the land on which their housing estate stood was charged by the developer to Bank Islam. To confirm the matter, the appellants asked the respondents for a copy of the result of a land search they had done when they prepared the SPA. The respondents replied that they could not locate the search documents. As it turned out, the respondents had not done a land search at the time the SPA was prepared. Bank Islam wound up the developer and proceeded to take foreclosure action on the charged lands. In September 2014, Bank Islam notified the appellants that if they did not pay a redemption sum of RM900,000 within a month, their property would be auctioned off. In July 2015, the appellants sued the respondents for professional negligence and negligent misstatement in their handling of the matter. The respondents refuted the appellants' claim and, inter alia, contended that it was time-barred under s 6(1)(a) of the Limitation Act 1953 ('the LA'). The High Court allowed the appellants' claim and awarded them RM1.5m as damages after finding that the respondents had breached their duty of care to the appellants which caused

the latter to suffer loss and damage. The Court of Appeal ('COA') overturned the decision on the ground that the appellants' claim was time-barred as time for the purposes of computing the six-year limitation period under s 6(1)(a) of the LA ran from 2004 — either when the SPA was executed or when the purchase price for the property was fully paid — and not from the time the appellants discovered that their property had been charged to Bank Islam or when the bank formally notified the appellants of its intention to foreclose their property. The instant appeal was against the COA's decision.

Held, allowing the appeal, setting aside the COA's decision and restoring the High Court's decision:

(1) In actions founded in tort, damage was an essential element, without which there was no complete and actionable claim. Time ran from when damage occurred and not when the negligent act or omission occurred. Hence, in a tortious claim arising from a negligently-prepared agreement, the time-period for purposes of limitation would run from the date of infringement of the claimant's rights caused by the impugned agreement and not from the date of the agreement itself (see paras 2, 52 & 72).

(2) It was evident that the appellants did not suffer loss or damage until Bank Islam exercised its right under the charge and a formal notice to foreclose or proceed for an order for sale was issued on 2 September 2014. Bank Islam's earlier notice of foreclosure and a demand to pay dated 14 November 2013 sent through its solicitors was still a contingent loss (see para 70).

(3) It was unjust and unreasonable to require the appellants to institute a claim before the contingency — ie, a claim by Bank Islam — was fulfilled. The appellants' claim, initiated in 2016, was thus not time-barred and the COA erred in holding that it was (see para 71).

(4) The respondents' negligence in the preparation of the agreements, especially the SPA, only gave rise to a contingent loss, dependent on whether or not Bank Islam would enforce the charge. When it did, that was when there was damage suffered by the appellants. This approach of requiring actual damage as opposed to contingent or prospective loss was consistent with the proper and good administration of justice — that recourse to legal redress in the courts should be as a last resort and that when determining liability and damage, the court must be in a position to fully appraise the facts and apply the law, including adjudicating on loss which was both measurable and relevant (see paras 65–66).

(5) This court agreed with the COA's approach in *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* [2018] MLJU 304 and *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448 that knowledge or discoverability of the breach with reasonable diligence

was essential for the purpose of determining whether a cause of action had accrued. The COA's decision in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784, which held otherwise, was not preferred. The appellants were continuously misled and misrepresented as to the true facts by the respondents. If time ran from the date of preparation of the SPA, it was clear that even six years after that date, the appellants were in no position and could not have with reasonable diligence known that the SPA had errors or that the respondents had been negligent in its preparation. It was not until the appellants did their own search that they found out about the charge and enquired of the respondents as to result of the land search that was done on their property at the time the SPA was prepared (see paras 68, 74–75 & 83).

[Bahasa Malaysia summary

Perayu-perayu yang merupakan pasangan suami dan isteri, menyaman peguamcara mereka (responden-responden) atas kecuaian profesional dan kecuaian kerana gagal memaklumkan kepada mereka bahawa hartanah yang dibeli dari pemaju perumahan pada 2004 merupakan cagaran bank pemaju ('Bank Islam'). Perjanjian jual beli ('PJB') yang didraf oleh responden-responden tidak menyebut mengenai sebarang cagaran yang boleh menjejaskan hartanah tersebut. Selepas beberapa tahun menduduki hartanah tersebut, perayu mendapat tahu daripada jiran mereka bahawa hartanah mereka dicagarkan oleh pemaju kepada Bank Islam. Untuk mengesahkan perkara itu, perayu-perayu meminta responden-responden untuk mendapatkan salinan hasil carian tanah semasa mereka menyediakan PJB. Responden-responden menjawab bahawa mereka tidak dapat mencari dokumen carian itu. Responden sebenarnya tidak melakukan pencarian tanah pada semasa PJB dibuat. Bank Islam telah menggulungkan syarikat pemaju dan terus mengambil tindakan pengambilan segala hartanah yang dicagarkan. Pada September 2014, Bank Islam memaklumkan perayu-perayu bahawa sekiranya mereka tidak membayar jumlah hutang sebanyak RM900,000 dalam tempoh sebulan, hartanah mereka akan dilelong. Pada Julai 2015, perayu-perayu menyaman responden-responden atas kecuaian profesional dan kecuaian ketika mengendalikan perkara tersebut. Responden-responden membantah tuntutan perayu dan, antara lain, menghujahkan bahawa mereka telah dihalang oleh had masa menurut 6(1)(a) Akta Had Masa 1953 ('AHM'). Mahkamah Tinggi membenarkan tuntutan perayu-perayu dan menganugerahkan RM1.5 juta sebagai ganti rugi selepas mendapati responden-responden telah melanggar kewajipan berhati-hati mereka kepada perayu-perayu yang menyebabkan mereka mengalami kerugian. Mahkamah Rayuan ('MR') mengenepikan keputusan itu atas alasan bahawa tuntutan perayu telah dihalang oleh had masa dengan mengira tempoh had enam tahun di bawah s 6(1)(a) AHM berjalan dari 2004 — sama ada apabila PJB dilaksanakan atau apabila harga pembelian harta itu dibayar sepenuhnya — dan bukannya dari masa perayu mengetahui bahawa harta mereka telah

dicagarkan kepada Bank Islam atau ketika bank secara rasmi memaklumkan kepada perayu tentang niatnya untuk mengambil hartanah mereka. Rayuan ini adalah terhadap keputusan MR tersebut.

Diputuskan, membenarkan rayuan, mengenepikan keputusan MR dan mengembalikan keputusan MT:

(1) Dalam tindakan tort, kerosakan atau kerugian adalah elemen penting untuk memulakan tindakan tuntutan. Had masa bermula dari ketika kerosakan atau kerugian berlaku dan bukannya ketika perbuatan cuai atau peninggalan berlaku. Oleh itu, dalam tuntutan yang timbul dari perjanjian yang disediakan secara cuai, tempoh masa untuk had masa berjalan dari tarikh pelanggaran hak-hak penuntut yang disebabkan oleh perjanjian tersebut dan bukannya dari tarikh perjanjian (lihat perenggan 2, 52 & 72).

(2) Adalah jelas bahawa perayu-perayu tidak mengalami kerugian atau kerosakan sehingga Bank Islam melaksanakan hak cagarannya dan notis rasmi untuk menyita atau meneruskan perintah jualan yang dikeluarkan pada 2 September 2014. Notis awal penyitaan oleh Bank Islam dan tuntutan untuk membayar bertarikh 14 November 2013 yang dihantar melalui peguamcaranya merupakan kerugian luar jangka (lihat perenggan 70).

(3) Adalah tidak adil dan tidak munasabah untuk meletakkan keperluan kepada perayu-perayu membuat tuntutan sebelum kerugian luar jangka — iaitu, tuntutan oleh Bank Islam — dipenuhi. Tuntutan perayu-perayu, yang dimulakan pada 2016, oleh itu tidak dihalang oleh had masa dan MR terkhilaf ketika membuat keputusan tersebut (lihat perenggan 71).

(4) Kecuaian responden dalam penyediaan perjanjian-perjanjian, terutamanya PJB, menyebabkan kerugian luar jangka, bergantung kepada sama ada Bank Islam akan menguatkuasakan cagaran tersebut. Apabila ianya berlaku, ketika itulah terdapat kerugian yang dialami oleh perayu. Pendekatan yang memerlukan kerugian sebenar berbanding kerugian luar jangka atau kerugian prospektif adalah selaras dengan pengurusan keadilan yang bagus — bahawa penyelesaian kepada penyelesaian undang-undang di nahkamah haruslah menjadi jalan terakhir dan apabila menentukan liabiliti dan kerugian. Mahkamah mesti berada dalam kedudukan untuk menilai sepenuhnya fakta dan menggunakan undang-undang, termasuk menilai kerugian yang boleh diukur dan relevan (lihat perenggan 65–66).

(5) Mahkamah ini bersetuju dengan pendekatan MR dalam *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* [2018] MLJU 304 dan *AmBank (M) Bhd v Kamariyah bt Hamdan &*

Anor [2013] 5 MLJ 448 bahawa pengetahuan pelanggaran munasabah adalah penting untuk menentukan sama ada punca tindakan telah terakru. Keputusan MR dalam kes *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784, yang diputuskan sebaliknya, tidak diambil kira. Perayu-perayu tersalah tafsir fakta sebenar oleh responden-responden. Sekiranya masa berjalan dari tarikh penyediaan PJB, jelaslah bahawa walaupun enam tahun selepas tarikh itu, perayu-perayu tidak dapat mengetahui bahawa PJB mempunyai kesilapan atau bahawa responden telah cuai menyediakannya secara munasabah. Hanya dengan perayu-perayu melakukan carianlah baru mereka mengetahui terdapat cagaran dan menyiasat responden mengenai hasil carian tanah yang dilakukan ke atas hartanah ketika PJB disediakan (lihat perenggan 74–75, 68 & 83).]

Cases referred to

AJS v JMH and another appeal [2022] 1 MLJ 778; [2022] 1 CLJ 331, FC (refd)
AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors [2010] 3 MLJ 784; [2010] 7 CLJ 663; [2009] 4 MLRA 458, CA (not folld)
AmBank (M) Bhd v Kamariyah bt Hamdan & Anor [2013] 5 MLJ 448, CA (folld)
Backhouse v Bonomi (1861) 9 HL Cas 503, HL (refd)
Bell v Peter Browne & Co (a firm) [1990] 3 All ER 124, CA (refd)
Board of Trade v Cayzer, Irvine & Co [1927] AC 610, HL (refd)
Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain [2022] 3 MLJ 450; [2022] 4 CLJ 657, FC (refd)
Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and Others v E Jopling & Sons, Ltd [1963] 1 All ER 341, HL (refd)
Coburn v Colledge [1897] 1 QB 702, CA (refd)
Costa v Georghiou (1983) 1 PN 201, CA (refd)
Credit Corporation (M) Bhd v Fong Tak Sing [1991] 1 MLJ 409; [1991] 2 CLJ 871, SC (folld)
DW Moore & Co Ltd and others v Ferrier and others [1988] 1 WLR 267, CA (refd)
Darley Main Colliery Co v Mitchell (1886) 11 App Cas 127, HL (refd)
Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829; [2023] 5 CLJ 167; [2023] 4 MLRA 114, FC (refd)
Forster v Outred & Co [1982] 1 WLR 86, CA (refd)
Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid [1998] 1 MLJ 615; [1997] 4 CLJ Supp 320, HC (refd)
Henderson v Merrett Syndicates Ltd [1995] 2 AC 145, HL (refd)
Law Society v Sephton & Co (a firm) and others [2006] 2 AC 543, HL (refd)
Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226; [1989] 1 CLJ 137; [1988] 1 MLRA 294, SC (refd)

Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm) [1978] 3 All ER 571, Ch D (refd)
Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors [2010] 9 MLJ 603; [2010] 6 MLRH 91, HC (refd)
Nasri v Mesah [1971] 1 MLJ 32; [1970] 1 LNS 85, FC (refd)
Neogh Soo Oh & Ors v G Rethinasamy [1984] 1 MLJ 126; [1983] CLJ Rep 663; [1983] 1 MLRH 175 (refd)
Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor [2020] 4 MLJ 380; [2020] 5 CLJ 82; [2020] 3 MLRA 535, CA (refd)
RB Policies at Lloyd's v Butler [1950] 1 KB 76, KBD (refd)
Read v Brown (1888) 22 QBD 128, CA (refd)
Reeves v Butcher [1891] 2 QB 509, CA (refd)
Ross v Caunters [1980] Ch 297, Ch D (refd)
SWF Hoists & Industrial Equipment Pty Ltd v State Government Insurance Commission [1990] FCA 402, FC (refd)
Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal [2018] MLJU 304; [2018] 1 LNS 357, CA (folld)
Tan Kah Fatt & Anor v Tan Ying [2023] 2 MLJ 583; [2023] 2 MLRA 525, FC (refd)
Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased) [2020] 4 MLJ 721; [2020] 7 CLJ 561, FC (refd)
The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon) [2006] 2 MLJ 209; [2005] 4 CLJ 717, FC (refd)
Vista Specialist Eye Center Sdn Bhd v Dato' Loo Son Yong and another appeal [2016] 5 MLJ 832, CA (refd)
Wardley Australia Ltd v State of Western Australia (Rothwells Loan case) (1992) 109 ALR 247, HC (refd)
Yew Boon Tew & Anor v Kenderaan Bas Mara [1983] 1 MLJ 1; [1983] CLJ Rep 56; [1982] 1 MLRA 425, PC (refd)
Yong & Co v Wee Hood Teck Development Corporation [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251; [1984] 1 MLRA 165, FC (refd)

Legislation referred to

Accountant's Report Rules 1986 and 1991 [UK]
Consumer Protection Act 1987 [UK]
Limitation Act of 1980 [UK]
Interpretation Acts 1948 and 1967 s 17A
Limitation Act 1953 ss 2, 3, 4, 6, 6(1)(a), 6A, 29, 30, 32, 33,
Public Authorities Protection Act 1948
Rules of Court 2012

Appeal from: *Lee Kim Noor & Anor v Julian Chong Sook Keong & Anor* [2022]

2 MLJ 338 (Court of Appeal, Putrajaya)

Ong Yu Shin (with Ooi Keng Liang, Lim Wooi Ying and Yu Haa Xi) (Shariffah, Ooi & Co) for the appellant.
Murelidaran s/o Navaratnam (with Vijaya Navaratnam and Felix Lim Xian Feng) (Mureli Navaratnam) for the respondents.

Mary Lim FCJ (delivering judgment of the court):

[1] The appellants, husband and wife sued their lawyers for professional negligence and negligent misstatement relating to the preparation of a sales and purchase agreement in 2004. The suit was filed in 2015. The claim was allowed by the High Court after a full trial. The decision was however, set aside on appeal because the claim was held to be time-barred under the Limitation Act of 1953 (Act 254). The High Court did not deal with this issue although it was pleaded and submitted on by the parties.

[2] Leave was granted on the following two questions of law to be determined by this court; both questions concern the issue of limitation:

(a) first question:

In a tortious claim arising from a negligently prepared agreement, does the time-period for limitation begin to run from the date of the impugned agreement; or does time begin to run from the date of an infringement or threat of infringement of the claimant's right caused by the impugned agreement?

(b) second question

In respect of when the limitation period starts to run in a claim of negligence, is the Court of Appeal's decision in *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663; [2009] 4 MLRA 458 still good law in light of the recent Court of Appeal decisions of *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* [2018] MLJU 304; [2018] 1 LNS 357 and *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448?

[3] After a full hearing, we found merits in the appellants' arguments and unanimously allowed the appeal. We set aside the decision of the Court of Appeal and restored the decision of the High Court.

THE SPA

[4] The appellants purchased landed property from a housing developer, Reka Mesra Sdn Bhd. They engaged RFC Consultancy Sdn Bhd to build a three-storey semi-detached house on that property. The respondents prepared

A both the sales and purchase agreement ('SPA') and construction agreement for the appellants (the first respondent is a partner in the second respondent firm of solicitors). Both agreements are dated 22 April 2004. The respondents left Item 3 of the First Schedule to the SPA for details on 'Name of Bank/Financier', blank. This signified that the property was not encumbered or charged.

B

[5] The house was completed in 2006 and the appellants moved in. They and their children now reside in that house. That family home is part of a housing community known as Krystal Garden.

C

[6] In 2009, the appellants learnt from their neighbours that several plots of land in Krystal Garden were encumbered, charged to Bank Islam and that a letter of disclaimer from Bank Islam was required. This prompted the appellants to require this letter of disclaimer through the respondents. The respondents in turn wrote to Bank Islam on 30 July 2009, requesting for this letter of disclaimer. The bank did not respond.

D

[7] On 15 June 2011, Reka Mesra Sdn Bhd was wound up. In November 2011, the appellants received a letter from Pejabat Tanah dan Galian ('PTG') informing them that landowners who do not have a letter of disclaimer would be required to pay a redemption sum as it was Bank Islam that had initiated the winding up proceedings against Reka Mesra Sdn Bhd. Because of this, the appellants once again approached the respondents in January 2012, this time asking for a copy of the respondents' search at the Land Office, presumably done when preparing the SPA.

E

F

[8] On 16 February 2012, the appellants attended a meeting at the office of the PTG, convened specifically to discuss the matter of titles in Krystal Garden. It was at that meeting that the appellants learnt that their properties were charged to Bank Islam.

G

[9] Around this same time in February 2012, the respondents responded to the appellants' query on the search at the Land Office by email. They told the appellants that they were unable to locate their documents on the search. In March 2012, the respondents speculated to the appellants that the search must have yielded a negative result which is why they were unable to locate the search documents — see para 19 of the statement of claim.

H

I

[10] In fact, the respondents were somewhat economical with the truth. As it turned out, they actually did not conduct any land search at the time of preparation of the SPA. Such a search is almost always carried out as part of good and proper conveyancing practice in order to verify the status of the

property, whether the property was encumbered by any charge etc. Instead, the respondents simply left Item 3 of the First Schedule to the SPA for details on 'Name of Bank/Financier', blank.

[11] The appellants lodged a complaint against the first respondent before the Disciplinary Board on 22 May 2012. On 22 April 2014, the Disciplinary Committee found the first respondent negligent in the preparation of the SPA and recommended that the first respondent be reprimanded and fined. The findings and recommendation were accepted by the Disciplinary Board on 22 November 2014. There was no appeal by the first respondent.

[12] Meanwhile, Bank Islam informed the appellants on 2 September 2014 that they had to pay a redemption sum of RM900,000 no later than 31 October 2014; failing which the bank would apply for the property to be auctioned off.

[13] The appellants decided to sue the respondents for professional negligence and negligent misstatement on 28 July 2015 at the sessions court. The appellants alleged that the respondents were negligent in, inter alia, preparing the SPA and in not conducting a land search; that the respondents made negligent misstatements on their actions in relation to the charge and the search which statements were relied on by the appellants to their detriment; and also for deliberately covering up their negligence. The respondents denied liability, claiming, inter alia, they owed no duty of care to the appellants, there was, in any case, no breach of any duty, and the claim was time-barred under the statute of limitations. The suit was later transferred to the High Court.

DECISIONS OF THE HIGH COURT AND COURT OF APPEAL

[14] After a full trial, the claim was dismissed by the High Court on 30 November 2017. This decision was however, reversed on appeal and a retrial was ordered on 11 July 2018 by the Court of Appeal. At the end of this new hearing, the claim was allowed. The High Court found the claim proved; that the respondents owed the appellants a duty of care, that there was a breach of that duty in the various ways complained of, and that damage was suffered as a result of the breach. The learned judge awarded compensation of a sum of RM1.5m together with interest and costs.

[15] On appeal, this decision was overturned. The Court of Appeal agreed with the respondents, finding the learned judge had erred in not addressing the defence of limitation which it went on to say was sustainable in law and on the facts.

[16] On that issue, the Court of Appeal found the claim time-barred, that for

an action founded in tort, the six-year period under s 6(1)(a) of the Limitation Act 1953 (Act 254) starts to run from the date when the SPA was prepared in 2004, and not from when the appellants discovered the damage in 2013/2014 when Bank Islam issued the formal foreclosure notice and demanded the redemption sum of RM900,000. The Court of Appeal cited *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors* [2010] 3 MLJ 784; [2010] 7 CLJ 663; [2009] 4 MLRA 458 and *Vista Specialist Eye Center Sdn Bhd v Dato' Loo Son Yong and another appeal* [2016] 5 MLJ 832 in support.

[17] According to the Court of Appeal, since the negligence of the respondents was in not conducting the land search in 2004 and to ensure that the appropriate column in the SPA was properly entered with the correct details, the period of limitation (para 41):

> ... can be said to have begun to run only from the first clear and unequivocal threat to the plaintiffs' right to purchase the said property, free from all liens and encumbrances, arising from the defendants' breach of their duty of care. Thus, the plaintiffs would have suffered damage, the moment the SPA was executed as the plaintiffs would have contracted to purchase a property which was encumbered with a charge and which charge was not reflected in the SPA, thereby placing the plaintiffs in a position of detriment. Hence, the plaintiffs' cause of action in the present case arose on the date when the plaintiffs executed the SPA which is either on 6 April 2004 or 22 April 2004.

[18] The Court of Appeal added at para [44] that 'even if the plaintiffs' cause of action for tort does not arise on the date when the plaintiffs executed the SPA, the cause of action for the tort of professional negligence would have accrued on the date when the plaintiffs paid the full purchase price for the said property, which is on 26 May 2004 as the plaintiffs would have suffered damage by virtue of being owners of a property which is encumbered with a charge, thereby placing the plaintiffs in a position of detriment'.

[19] The Court of Appeal further found the appellants not entitled to rely on s 29 of the Limitation Act 1953 due to want of plea.

OUR DELIBERATIONS AND ANALYSIS

[20] The two questions of law posed concerns the matter of limitation. For a great many of cases that pass through the civil litigation system in this country, limitation is not an issue and the ascertainment of whether a given claim is barred by the statute of limitations is simple, obvious and uncontroversial. This is however, not the case in the present appeal.

[21] Preliminarily and this is absolutely vital, it must be appreciated that the High Court's numerous findings of negligence on the part of the respondents

remains undisturbed by the Court of Appeal. The failure of the respondents to do the requisite land search is also not in controversy. The same may be said of the conduct of the respondents in 'covering up' their negligent acts, by first asserting or claiming that a search had been done when in fact none was; as well as a host of other acts of negligence as alleged by the appellants. In other words, the whole of the appellants' claims against the respondents for professional negligence and negligent misstatement in the manner and for the reasons pleaded, stands proved. Although allowed at first instance, the claim was dismissed on appeal, but only because of the issue of limitation.

[22] For the purposes of s 6 of the Limitation Act 1953 (Act 254), when does time run in a claim or cause of action founded in the torts of negligence and negligent misstatement? Is it from the date of the act complained of or is there some other point in time or event that is more relevant or appropriate? What if there is more than a single act; that there is a series of acts or actions complained of as was the case in this appeal. Does time run from the first or last act complained of? To some extent there are inroads introduced *vide* Limitation (Amendment) Act 2018 (Act A1566/2018) with the new ss 6A and 24A but that is from the aspect of discoverability of damage.

[23] The answer to this requires us to return to some fundamental concepts and principles. First, s 6 of the Limitation Act 1953 (Act 254) which reads as follows:

> 6 Limitation of actions of contract and tort and certain other actions
>
> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years *from the date on which the cause of action accrued,* that is to say —
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture. (Emphasis added.)

[24] Section 6(1) provides that an action founded on a contract or on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. The causes of action here were in tort, and s 6(1) requires the civil claim to have been filed before the expiration of six years from the date on which the cause of action accrued.

[25] Limitation is generally raised as a defence and if successfully relied on renders the cause of action though valid, irrecoverable insofar as the remedies

A are concerned. It, however, must be pleaded — see s 4:

> 4. Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

B

[26] Limitation is also a creation of statute unlike the common law principle of *laches* — see *Law of Limitation* by Choong Yeow Choy (Butterworths 1995), pp 3–8. At common law, there is no time limit on a person's right to bring an C action for tort and it is this principle of *laches* that sieves out stale claims.

[27] As a creature of statute, limitation under the Limitation Act is procedural as it does not affect accrued rights and interests. Limitation does not extinguish rights, it merely bars access to remedies. There is thus a need to D construe the relevant provision against the whole statute; and not just read each section unto itself, as if disparate and unrelated to the rest.

[28] When interpreting statutes, there must be proper regard to s 17A of the Interpretation Acts 1948 and 1967 (Act 188). It should not be and is in fact no E longer a case of applying the literal rule first and only resorting to the purposive rule of interpretation when all else fails with the introduction of this purposive rule of interpretation into legislation, rendering this rule no longer a common law canon of interpretation but one with statutory force. This is clear from the line of authorities emanating from this court — see *Tebin bin Mostapa (as administrator of the estate of Hj Mostapa bin Asan, deceased) v Hulba-Danyal bin Balia & Anor (as joint administrators of the estate of Balia bin Munir, deceased)* [2020] 4 MLJ 721; [2020] 7 CLJ 561; *Bursa Malaysia Securities Bhd v Mohd Afrizan bin Husain* [2022] 3 MLJ 450; [2022] 4 CLJ 657; *AJS v JMH and another appeal* [2022] 1 MLJ 778; [2022] 1 CLJ 331; *Tan Kah Fatt & Anor v Tan Ying* [2023] 2 MLJ 583; [2023] 2 MLRA 525; *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals* [2023] 3 MLJ 829; [2023] 5 CLJ 167; [2023] 4 MLRA 114.

H **[29]** These authorities remind us of a contextual construction within the purview or in accordance with the intent or object of the legislation, that is, the purposive rule of construction as statutorily enunciated in s 17A. The reading or meaning that the courts give to the provisions must promote and not stifle the object or intent of the legislation concerned. In any event, it would be I difficult to envisage an interpretation which runs afoul of the literal rule of interpretation just to accord with the purposive rule as legislation is written in accord and to facilitate the intent and purpose of the legislation, and not otherwise.

[30] The intent and object of any legislation is usually gathered from the long title of the legislation itself. Here, the long title reads that it is 'An Act to provide for the limitation of actions and arbitrations'. The term 'limitation' itself is not defined in Act 254 but the term 'action' is defined in s 2 as 'includes a suit or any other proceeding in a court of law'. This broad definition throws some light or indication as to the intent, purpose and scope of Act 254. Although at first glance, this expansive definition seemingly suggests that the scope or cover of Act 254 may not necessarily be confined to actions filed in a court of law, it actually is. The word 'includes' refers or pertains to the type of proceeding that may be initiated in a court of law, as opposed to where the action may be initiated. An action may be commenced in a court of law through a civil suit, originating summons, motion or petition (depending on the rights or interests invoked and legislation relied on though the Rules of Court 2012 now prescribe for two primary originating processes). However, under the English Limitation Act of 1980 and the various jurisdictions of the civil courts in England, Andrew McGee in *Limitation Periods* at p 26 (7th Ed, Sweet & Maxwell 2014) opines that 'time limits do not apply to an action which is not governed by the 1980 Act at all, such as certain actions for equitable relief or an action asking the court to exercise its inherent jurisdiction over a solicitor'. It is arguable that a persuasive argument to like effect may be made in relation to our Act 254 but that is not the concern in this appeal.

[31] What is of concern here is the validity of the defence of limitation raised. That determination is one for the courts and when interpreting and applying the provisions of Act 254, the current canons of interpretation as decided by the apex court apply, a point already alluded to earlier.

[32] Returning then to the task at hand, although the term 'limitation' is not defined in Act 254, the term assumes a particular meaning in the administration of justice; with Hashim Yeop Sani SCJ in *Credit Corporation (M) Bhd v Fong Tak Sing* [1991] 1 MLJ 409; [1991] 2 CLJ 871 explaining the policy reasons for the existence of limitation:

> The doctrine of limitation is said to be based on two broad considerations. Firstly there is a presumption that a right not exercised for a long time is nonexistent. The other consideration is that it is necessary that matters of right in general should not be left too long in a state of uncertainty or doubt or suspense.
>
> The limitation law is promulgated for the primary object of discouraging plaintiffs from sleeping on their actions and more importantly, to have a definite end to litigation. This is in accord with the maxim *interest reipublicae ut sit finis litium* that in the interest of the state there must be an end to litigation. The rationale of the limitation law should be appreciated and enforced by the courts.

[33] In *Yew Boon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1; [1983] CLJ Rep 56; [1982] 1 MLRA 425, the Privy Council explained that 'when a

A period of limitation has expired, a potential defendant should be able to assume that he is no longer at risk from a stale claim. He should be able to part with his papers if they exist and discard any proofs of witnesses which have been taken, discharge his solicitor if he has been retained; and order his affairs on the basis that his potential liability has gone. That is the whole purpose of the limitation B defence'.

[34] The statute of limitations thus serves to limit or provide for a limit in terms of time by which action in court or arbitration may be commenced to C enforce rights, interests, benefits or to seek some relief or remedy. Upon expiration of the limitation period, the claim is barred; hence the phrase, 'time-barred'.

[35] That bar, however, bars only the right to judicial relief or remedies but D not the cause of action which remains complete and not extinguished. Limitation merely takes away the judicial remedy as a defendant may choose not to raise limitation. Thus, until limitation is pleaded or raised as a defence (see s 4 of Act 254), a plaintiff's cause of action is not regarded as time-barred.

E **[36]** The period of time prescribed in Act 254 carries the appropriate formula for computation of a period depending on whether it is an action in contract or tort; actions to recover land and rent; recover money secured by mortgage or charge or to recover proceeds of the sale of land; or simply actions in respect of trust property or personal estate of deceased persons. Besides these F prescriptive provisions, there are provisions dealing with extensions of limitation period in specific situations; for example, in case of disability; effect of part payment, acknowledgement and similar circumstances; as well as the postponement of limitation period.

G **[37]** All this, however, does not mean that Act 254 is the final or complete word on the law of limitations, that it is a code containing comprehensive and exhaustive provisions on limitations. This is obvious from the terms of ss 3, 30 and 33, that there may be other laws relating to limitation; for instance, the H Public Authorities Protection Act 1948 (Act 198), that those laws are to apply instead of Act 254 or to apply alongside Act 254, depending on the specific terms of the provision. The view expressed in *Muhamad Solleh bin Saarani & Anor v Norruhadi bin Omar & Ors* [2010] 9 MLJ 603; [2010] 6 MLRH 91 that the Limitation Act is 'special law and is a complete code by itself' is thus I incorrect.

[38] In any case, there is also s 32 of Act 254 which reads as follows:

> 32 Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence, laches or otherwise.

[39] Section 32 suggests that even if a claim is not time-barred or if the limitation laws do not apply, the claim may nevertheless be refused on grounds founded in equity. This fortifies the earlier view that Act 254 is not a complete codification of the law on limitation of actions; neither is it to apply to the exclusion of equitable considerations. This accords with the view expressed by Andrew McGee in *Limitation Periods* at p 34 that in a certain number of cases, the effect of an expiry of the period of limitation is to extinguish entirely the plaintiff's right and not merely the access to a remedy. Examples cited being actions for recovery of land, conversion and certain actions filed under the English Consumer Protection Act 1987 and the Hague-Visby Rules.

[40] With that backdrop and acknowledging the object and policy reasons behind the intent of the legislation, appropriate care and caution must be exercised when determining whether an action is or is not statute barred. The balancing of rights between potential claimants and defendants is sound and necessary for the proper administration of justice but it is an exercise conducted by the court and no other. It is a judicial exercise involving interpretation and application of the law to the particular facts.

[41] In the appeal before us, the appellants' statement of claim starts with the contractual relationship between the parties. However, the claim is not founded on that contractual relationship; it is grounded in tort. It claims the existence of a duty of care owed by the respondents to them, that there is a breach of that duty of care in the manner and for the reasons already set out in the earlier part of this judgment; and that by reason of the breach, the appellants have suffered damage in the value of their property and other damage. As pointed out earlier, all these elements were successfully established by the appellants and the findings of fact by the High Court remained undisturbed by the Court of Appeal. There was no appeal by the respondent. The only issue was that of limitation.

[42] Section 6(1)(a) provides that the time limited for filing of the action founded in tort is six years *from the date on which the cause of action accrued.* This phrase 'cause of action' too, is not defined in the Act. Numerous case laws from here and other jurisdictions have attempted some definition, much of which may now be described as trite. A closer examination and appreciation on what that all-important term means is nevertheless warranted.

[43] We start with the Supreme Court decision in *Credit Corporation (M) Bhd v Fong Tak Sin* cited earlier for the *rationale* behind limitation laws. At p 411 (MLJ); p 873 (CLJ), the Supreme Court explained what the term 'cause of action' means:

> In *Cooke v Gill* [1873] LR 8 CP 107 Brett J defined 'a cause of action' to mean *'every fact which is material to be proved to entitle the plaintiff to succeed.'* This definition was

> subsequently approved by the Court of Appeal in *Read v Brown* (1888) 22 QBD 128. After reviewing the authorities Yong J in *Lim Kean v Choo Koon* [1970] 1 MLJ 158; [1969] 1 LNS 94 came to the conclusion that the period of limitation does not begin to run 'until there is a complete cause of action'. In that case he held that the plaintiff's cause of action was not complete until an order is obtained from the Rent Assessment Board fixing the amount of the rent legally recoverable under the Control of Rent Ordinance. He accordingly held that the period of limitation commenced to run only from the date of the order of the board. *From established authorities we can now accept that the cause of action normally accrues when there is in existence a person who can sue and another who can be sued, and when all the facts have happened which are material to be proved to entitle the plaintiff to succeed.* (Emphasis added.)

[44] Thus, following *Credit Corporation*, 'cause of action accrues' means when all the material facts required to successfully prove a claim either exists or has happened and this includes the existence of a person who can sue and another who can be sued. In *Credit Corporation*, the decision of *RB Policies at Lloyd's v Butler* [1950] 1 KB 76 was cited for the proposition that so long as there is in existence such persons to be sued, it does not matter that their identities or whereabouts are not known or available before a cause of action is said to have accrued. All that is required is that there exists such a person or tortfeasor but his identity may be unknown or his whereabouts, untraceable, per Streatfield J:

> Is it to be said that because a person is, possibly only temporarily, untraceable, he is not in existence, or cannot be sued? Whoever the thief was, if he had been traceable, he could have been sued: so I doubt whether it can be said that there was no person in existence, for the purpose of that definition, who could have been sued.

[45] In *RB Policies*, a car was stolen and the identity of the thief was not known and the car was not found till long after the limitation period had set in. By this time, the car had changed ownership a few times and even had a different registration number. The owners of the car sued the defendant who was an innocent purchaser for value of the car, for its recovery under the tort of conversion. In finding the claim time-barred, the court held that it did not matter if the identity of the thief was unknown. According to Streatfield J, '... therefore, that prima facie as soon as there is a cause of action (as there clearly was in the present case the moment the motor-car was stolen) time begins to run notwithstanding the fact that the plaintiff is ignorant of the identity of the defendant'.

[46] Thus, two principles emerge: (1) a cause of action accrues when damage is suffered; (2) the cause of action is complete when there is a plaintiff who can sue and a defendant who can be sued, and when the elements of duty, breach and damage are all satisfied — see *Coburn v Colledge* [1897] 1 QB 702. The latter is when the cause of action becomes actionable or, 'possible' (see *Board of*

Trade v Cayzer, Irvine & Co [1927] AC 610 at p 617).

[47] In *Nasri v Mesah* [1971] 1 MLJ 32; [1970] 1 LNS 85, Gill FCJ described a cause of action as 'the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Esher MR in *Read v Brown* (1888) 22 QBD 128)'. The Federal Court went on to refer to *Reeves v Butcher* [1891] 2 QB 509 where Lindley LJ said:

> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland*, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.

[48] What material facts have to be proved will vary from case to case, largely dependent on the pleaded case. When the defence of limitation is raised, the burden of pleading and proving that the action was brought within the time prescribed under Act 254 rests with the appellants. In *Cartledge (Widow and Administratrix of The Estate of Fred Hector Cartledge (deceased)) and Others v E Jopling & Sons, Ltd* [1963] 1 All ER 341, Lord Pearce said:

> I agree that when a defendant raises the statute of limitation the initial onus is on the plaintiff to prove that his cause of action occurred within the statutory period. When, however, a plaintiff has proved an accrual of damage within six years ... the burden passes to the defendants to show that the apparent accrual of cause of action is misleading and that in reality the cause of action accrued at an earlier date.

FIRST QUESTION

[49] Having set out the relevant principles for consideration, we now return to the questions posed earlier of when exactly does time begin to run for actions founded in the torts of negligence and negligent misstatement; and what happens if there are several acts or a series of actions committed? More specifically, in a tortious claim arising from a negligently prepared agreement, does the time-period for limitation begin to run from the date of the impugned agreement; or does time begin to run from the date of an infringement or threat of infringement of the claimant's right caused by the impugned agreement?

[50] This is where one must be alert to the fact that there may be more than one breach giving rise to two different causes of action, though both may be founded in tort; or one in tort, the other in contract. The liability of solicitors may be founded in both contract and tort; that is settled law — see *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571; *Ross v Caunters* [1980] Ch 297; *Forster v Outred & Co* [1982] 1 WLR 86; *Costa v Georghiou* (1983) 1 PN 201; *DW Moore & Co Ltd and others v Ferrier*

and others [1988] 1 WLR 267; *Bell v Peter Browne & Co (a firm)* [1990] 3 All ER 124; *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145; *Yong & Co v Wee Hood Teck Development Corporation* [1984] 2 MLJ 39; [1984] 1 CLJ Rep 251; [1984] 1 MLRA 165; and *Neogh Soo Oh & Ors v G Rethinasamy* [1984] 1 MLJ 126; [1983] CLJ Rep 663; [1983] 1 MLRH 175.

[51] It bears reminding that in this appeal, the claim was not one founded in contract, where frequently the courts have referred to *Nasri v Mesah* as authority for the proposition that the cause of action in contract accrues from the breach. Gill FCJ had opined there that 'the period of limitation … can be said to have begun to run from the first clear and unequivocal threat to the plaintiff's right to a transfer of the land'. The pleadings were then examined to determine what the pleas and responses were before the Federal Court concluded that there was no evidence of any such threat in which case the claim was not time-barred. See also *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209; [2005] 4 CLJ 717.

[52] In actions founded in tort, damage is an essential element, without which there is no complete and actionable claim. Time runs from when damage occurs and not when the negligent act or omission occurred — see *Bell v Peter Browne & Co (a firm)* per Nicholls LJ who said:

> One might have expected that parallel professional negligence claims based on contract and the tort of negligence would have a common starting date for the running of the six-year limitation periods applicable in most cases under the 1980 Act. *But this is not so, because a cause of action based on negligence does not accrue until damage is suffered.* It is from that date, not the date on which negligent act or omission occurred, that the six-year limitation period prescribed by section 2 of the Limitation Act 1980 runs. (Emphasis added.)

[53] In *Bell v Peter Browne & Co (a firm)*, the defendant solicitors were employed by the plaintiff to act on his behalf in divorce proceedings. The plaintiff and his wife had agreed that the matrimonial home which was in their joint names, be transferred to the sole name of the wife. When the home was sold, the plaintiff would be entitled to one-sixth of the proceeds of sale. Until such sale, the wife was entitled to live in the home and the plaintiff's interest would be protected by a trust deed or mortgage. The home was duly transferred to the wife but the defendant neglected to take steps to protect the plaintiff's interests, as instructed. Eight years later, the wife sold the home and spent the proceeds. The plaintiff sued the solicitors in both contract and tort. In dismissing the appeal against the striking out on ground of limitation, the Court of Appeal observed:

> In considering whether damage was suffered in 1978 one can test the matter by considering what could have happened if in, say, 1980 Mr Bell had learnt of his

> solicitors' default and brought an action for damages. Of course, he would have taken steps to remedy the default. But he would have been entitled at least to recover from the solicitors the cost incurred in going to other solicitors for advice on what should be done and for their assistance in lodging the appropriate action. The cost would have been modest, but not negligible.

[54] On the facts, asking that same question of the appellants would yield, at best, a right to some nominal damage; if the action was founded in contract in relation to the preparation of the relevant agreements. But, this was a claim in tort for negligent misstatement and negligence. The period of limitation runs from the date of the damage and not from the act which caused the damage — see *Backhouse v Bonomi* (1861) 9 HL Cas 503.

[55] However, *Bell v Peter Browne & Co* actually did not follow an earlier decision of the Court of Appeal in *Midland Bank Trust Co Ltd and another v Hett, Stubbs & Kemp (a firm)* [1978] 3 All ER 571, a decision which we prefer for its principles on this issue. This was in fact discussed by the High Court in *Goh Kiang Heng v Hj Mohd Ali bin Hj Abd Majid* [1998] 1 MLJ 615; [1997] 4 CLJ Supp 320. Although the *ratio decidendi* in that decision concerned the principles of striking out, Augustine Paul J took pains to examine this difficult and challenging aspect of the law of limitations. His Lordship noticed that the Court of Appeal had declined to follow *Midland Bank Trust Co Ltd,* distinguishing it on the facts; and had preferred to follow *Forster v Outred & Co.*

[56] Augustine Paul J noted that both *Forster* and *Bell v Peter Browne & Co* had been reviewed by the High Court of Australia in *Wardley Australia Ltd v State of Western Australia (Rothwells Loan case)* (1992) 109 ALR 247 with the High Court concluding that the damage or loss suffered by the plaintiff occurred when the plaintiff was called upon to pay, and not when the plaintiff entered into the indemnity agreement. The High Court refused to follow *Bell* and *Forster,* preferring instead *SWF Hoists & Industrial Equipment Pty Ltd v State Government Insurance Commission* [1990] FCA 402, where it was held that the requisite element was an actionable actual loss as opposed to a mere potential loss.

[57] The facts in *Wardley* were these: relying on representations made by the defendant, the plaintiff had given an indemnity in 1987. In 1989, the plaintiff was called upon to make payment pursuant to the indemnity. In its amended statement of claim, the plaintiff alleged that it had been induced to give the indemnity by the defendant's misleading representations. According to Mason CJ, Dawson, Gaudron and McHugh JJ:

> Economic loss may take a variety of forms and, as Gaudron J noted in *Hawkins v Clayton* [1988] 164 CLR 539, the answer to the question when a cause of action for negligence causing economic loss accrues may require consideration of the precise

A interest infringed by the negligent act or omission. The kind of economic loss which is sustained and the time when it is first sustained depend upon the nature of the interest infringed and, perhaps, the nature of the interference to which it is subjected. With economic loss, as with other form of damage, there has to be some actual damage. *Prospective loss is not enough.*

B When a plaintiff is induced by a misrepresentation to enter into an agreement which is, or proves to be, to his or her disadvantage, the plaintiff sustains a detriment in a general sense on entry into the agreement. That is because the agreement subjects the plaintiff to obligations and liabilities which exceed the value or worth of the rights and benefits which it confers upon the plaintiff. But, as will appear shortly, C detriment in this general sense has not universally been equated with the legal concept of 'loss or damages'. And that is just as well. In many instances the disadvantageous character or effect of the agreement cannot be ascertained until some future date when it impacts upon events as they unfold becomes known or apparent and, by then, the relevant limitation period may have expired. *To compel a plaintiff to institute proceedings before the existence of his or her loss is ascertained or* D *ascertainable would be unjust.* Moreover, it would increase the possibility that the Courts would be forced to estimate damages on the basis of likelihood or probability instead of assessing damages by reference to established events. In such a situation, there would be an ever-present risk of under-compensation or overcompensation, the risk of the former being the greater.

E In *UBAF Ltd v European American Banking Corp* [1984] QB 713 Ackner LJ said:

> The mere fact that the innocent but negligent misrepresentations caused the plaintiffs to enter into a contract which they otherwise would not have entered into, does not inevitably mean that they had suffered damage by merely entering into the contract. (Emphasis added.)

F

[58] The High Court of Australia noted that the English Courts had taken the position that time runs from the time of entry of contract regardless the loss being incapable of ascertainment until some later date due to the influence of G the principle propounded in *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127, that damages in respect of a cause of action are awarded on a once and for all basis. In the High Court's view, adopting that principle 'tells us very little, if anything, about the time when the plaintiff first suffers loss or damage in the circumstances of a particular case, except that properly understood, H *Darley Main Colliery* emphasises the need for actual, as distinct from prospective, damage before prospective damages can be included in the award'.

[59] For added measure, the High Court said:

I If, contrary to the view which we have just expressed, the English decisions properly understood support the proposition that where, as a result of the defendant's negligent misrepresentation, the plaintiff enters into a contract which exposes him or her to a contingent loss or liability, we do not agree with them. *In our opinion, in such a case, the plaintiff sustains no actual damage until the contingency is fulfilled and the loss becomes actual; until that happens the loss is prospective and may never be*

incurred. A deferred liability may stand in a different position but there is no occasion here to discuss that matter.

The conclusion which we have reached with respect of the time when the plaintiff first suffers loss in respect of contingent loss or liability accords with the comment of Gaudron J in *Hawkins v Clayton:*

> ... If the interest infringed is an interest in recouping moneys advanced it may be appropriate to fix the time of accrual of the cause of action when recoupment becomes impossible rather than at the time when the antecedent right to recoup should have come into existence, *for the actual loss is sustained only when recoupment becomes impossible*. (Emphasis added.)

Gaudron J went on to point out: 'It would be too simplistic to restrict analysis of economic loss merely to a consideration or reduced value or increased liability'.

The conclusion which we have reached is reinforced by the general considerations to which we referred earlier. It is unjust and unreasonable to expect the plaintiff to commence proceedings before the contingency is fulfilled. If an action is commenced before that date, it will fail if the events so transpire that it becomes clear that no loss is, or will be incurred. Moreover, the plaintiff will run the risk that damages will be estimated on a contingency basis, in which event the compensation awarded may not fully compensate the plaintiff for the loss ultimately suffered. These practical consequences which would follow from an adoption of the view for which the appellants contend outweigh the strength of the argument that the principle applicable to the cases in which the plaintiff acquires property (or a chose in action) should be extended to cases where an agreement subjects the plaintiff to a contingent loss. In such cases, it is fair and sensible to say that the plaintiff does not incur loss until the contingency is fulfilled.

Even in England recent decisions show that the judicial trend is to restrict the apparently broad principle laid down in the *Forster* line of cases. In *Hopkins v MacKenzie* [1995] 6 Med LR 26 as a result, allegedly, of negligence by the defendant solicitor, the plaintiff's claim against a hospital for medical negligence had been struck out for want of prosecution. The Court of Appeal held that the cause of action in tort against the solicitor accrued when the original claim was actually struck out, and not at any earlier date. The court rejected the submission that the cause of action accrued when the solicitor's delay was such that the original claim would inevitably be struck out. (Emphasis added.)

[60] Similar views on contingent, prospective or potential loss as opposed to actual loss and damage were expressed in *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another appeal* [2018] MLJU 304; [2018] 1 LNS 357, paras [23] to [25] and *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448. In *Sabarudin bin Othman*, the Court of Appeal observed that prospective loss may also never be incurred.

[61] See also *Nyo Nyo Aye v Kevin Sathiaseelan a/l Ramakrishnan & Anor* [2020] 4 MLJ 380; [2020] 5 CLJ 82; [2020] 3 MLRA 535, where the

Court of Appeal held that until the civil suit was struck out, the cause of action had not accrued. The act which caused the damage was the non-compliance of the order for security for costs but the actual damage occurred when the suit was in fact struck out for non-compliance.

[62] We agree with the approach taken in these cases; that there must be actual as opposed to only a prospective or contingent loss or damage. In fact, the approach in England has since altered to follow the view in *Wardley,* see *Law Society v Sephton & Co (a firm) and others* [2006] 2 AC 543. The House of Lords in *Law Society* agreed with the Court of Appeal that the mere possibility of an obligation to pay money in the future is not in itself damage for an actionable cause of action.

[63] In *Law Society,* a solicitor, Payne who was practising on his own, engaged the defendants as his accountants for the purpose of preparing and certifying annual reports containing information as prescribed by the Accountant's Report Rules 1986 and 1991, which Payne was required to submit to the Law Society under the Solicitor's Account Rules. Between 1989 and 1995, a partner at the defendants signed eight such reports, stating that he had examined all the relevant documents of Payne's practice and that he was satisfied that Payne had substantially complied with the Solicitor's Account Rules. It turned out that in fact, Payne had been misappropriating his client's monies between 1990 and 1996. The fraud was discovered by the Law Society in May 1996 when a former client of Payne complained to the Law Society and made a claim for compensation from the Solicitors Compensation Fund of which the Law Society is a trustee. In 2002, the Law Society sued the defendants for negligence claiming that it had relied on the defendants' reports when deciding not to exercise its powers of investigation or to intervene in Payne's practice before May 1996. At a preliminary hearing, it was ruled that the claim was time-barred as the cause of action accrued as soon as Payne misappropriated monies after the Law Society's receipt of the relevant reports, thereby exposing it to the risk of a claim against the compensation fund. The claim was accordingly struck out.

[64] The decision was reversed on appeal and the Court of Appeal's appeal was affirmed on appeal. Reminding that damage was an essential element in a cause of action for negligence, Lord Hoffman held that until the Law Society suffered damage in consequence of the defendants' negligence, there was no cause of action (a view shared by the other Law Lords). Payne's misappropriation gave 'rise to the possibility of a liability to pay a grant out of the fund, contingent upon the misappropriation not being otherwise made good and a claim in proper form being made. Such a liability would be enforceable only in public law, by judicial review, but would still in my opinion count as damage. But until a claim was actually made, no loss or damage was

sustained by the fund'. Describing the judgments of the High Court in *Wardley* as 'a masterly exposition of the law which deserves careful study', His Lordship said that he was in 'complete agreement with this analysis', that there must be actual or actionable damage and not a prospective loss which may never be incurred. Until a claim was made against the Law Society, no loss or damage was sustained by the fund. Further, the mere possibility of an obligation to pay money in the future was not itself damage; it was only contingent until a claim was made.

[65] Similarly, in the present appeal, the respondents' negligence in the preparation of the agreements only gave rise to a contingent loss, dependent on whether Bank Islam would enforce the charge. When it did, that was when there was damage suffered by the appellants.

[66] This approach of requiring actual damage as opposed to contingent or prospective loss is also consistent with the proper and good administration of justice, that recourse to legal redress in the courts should be as a last resort and when determining liability and damage, courts must be in the position to fully appraise facts and apply the law, including adjudicate on loss which is both measurable and relevant. As opined by the Deane J in *Wardley*:

> Finally, it appears to me to be unlikely that the Parliament would have intended, as a matter of policy, that a cause of action should arise under s 82 in a case where all that was involved was the incurring of an isolated contingent liability involving a mere risk (or greater risk) of actual liability to make a payment at some future time. The implementation of such a policy would give rise to the situation where a cause of action would arise regardless of whether any actual concrete loss was ultimately sustained by reason of either the contingency liability becoming an absolute one or some other financial detriment being actually sustained (eg a payment made to escape the contingent liability). The result would be to require the institution of proceedings before it was known whether any concrete loss or damage would ever come home, in order to avoid the possible injustice of a legitimate claim being barred if action was not instituted until it could be seen whether the contingent liability would result in ultimate loss. Moreover, the difficulties and expense involved in establishing the present value of an isolated contingent loss and the potential injustice involved in requiring proceedings to be instituted within a limited time after a contingent or potential liability first arises provide further reasons for the rejection of such an approach. From the point of view of policy, the main disadvantage involved in a situation where no cause of action accrues unless and until a contingent liability becomes absolute or some actual financial loss or detriment comes home is that circumstances could well arise in which it is desirable that entitlement and liability under s 82(1) be determined at an earlier stage. The availability of declaratory remedies and of the anticipatory remedies under s 87 of the Act go some way, however, to diminish the practical significance of that disadvantage.

[67] Act 254 has finely balanced the interests of ensuring stale claims are not

A prosecuted and the administration of justice abused against rights of access to justice to obtain redress for civil wrongs. The above reading and interpretation accorded to s 6 of Act 254 in particular, accords with that intent of Act 254.

B **[68]** For these reasons, the answers to the first question is, subject to particular facts which may arise and the pleas made, the time-period for limitation for a tortious claim arising from a negligently prepared agreement, runs from the date of actual damage, and not some contingent damage. The threat of an infringement must be unequivocal and real. The decision of the Court of Appeal in *Sabarudin bin Othman & Anor v Malayan Banking Bhd and*
C *another* is thus preferred over *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*.

[69] The facts pleaded as amounting to a claim of negligence and negligent misstatements must always be properly appreciated. In this appeal, when the
D appellants, as the respondents' clients, asked for evidence of the search at the Land Registry, a perfectly valid request, the respondents were evasive and prevaricated, they then misrepresented the truth and ultimately, they lied. These responses are not in the least in keeping with their duties as solicitors.

E **[70]** The respondents' responses to the appellants' queries and requests are not matters to be taken into consideration when determining quantum; they were further wrongs committed as solicitors who are under a continuing duty of care to their clients. From the facts, it is evident that the appellants did not suffer loss or damage until Bank Islam exercised its right under the charge and
F a formal notice to foreclose or proceed for an order of sale was issued on 2 September 2014. Bank Islam's earlier notice of 14 November 2013 sent through its solicitors of a notice to foreclose and a demand to pay was still a contingent loss.

G **[71]** Further, it would be unjust and unreasonable to require the appellants to institute a claim before the contingency, that is, a claim by Bank Islam, was fulfilled. The appellants' claim initiated in 2016 was thus not time-barred and the Court of Appeal was in error in holding otherwise.

H **[72]** The answer to the first question is that time runs from the date of infringement of the claimant's rights and not from the date of the agreement itself.

SECOND QUESTION

I

[73] The above answer is actually sufficient to dispose of the appeal. However, we feel compel to address the second question although there have since been legislative inroads. In respect of the second question, it is premised on the concepts of discoverability or knowledge of the negligence. This issue

has been substantially addressed by the new s 6A of Act 254. However, this new provision does not apply to the appellants' claim as it was filed before the s 6A came into force.

[74] In *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors*, the Court of Appeal held that knowledge or discoverability of the breach was immaterial for the purpose of determining whether a cause of action had accrued. Both decisions of the Court of Appeal in *Sabarudin bin Othman & Anor v Malayan Banking Bhd and another* and *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor*, held otherwise.

[75] We agree with the approach taken in *Sabarudin bin Othman* and *Ambank (M) Bhd v Kamariyah.*

[76] First, in *Ambank (M) Bhd v Kamariyah*, the Court of Appeal examined *Wardley* and *Law Society* amongst other cases before disagreeing with *AmBank (M) Bhd v Abdul Aziz bin Hassan & Ors.* The High Court had struck out a third-party notice issued by the appellant against the respondents who were the partners of a firm of solicitors, on the ground that it was barred by the statute of limitations. On appeal, that decision was set aside. The appellant in that appeal had alleged that the respondents were negligent in their preparation and giving of advice on a charge on lands owned by the plaintiffs, and which were being developed by the first defendant. The third, fourth and fifth defendants, directors of the first defendant were alleged to have fraudulently effected the charge in favour of the appellant as security for loans granted by the appellant to the first defendant. The plaintiffs claimed that the power of attorney given to the first appellant did not authorise such charge and had initiated proceedings to set aside the charge. In striking out the third-party proceedings, the respondents argued that it was time-barred as the cause of action accrued on 1 September 1997 when the loan was released to the first defendant, that that date was when damage was occasioned.

[77] Jeffrey Tan JCA, speaking for the Court of Appeal, disagreed. His Lordship examined a line of cases including *Wardley*, *Law Society* and *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226; [1989] 1 CLJ 137; [1988] 1 MLRA 294, before holding that:

> [11] Based on the aforesaid decisions of the apex court, *time would begin to run from the date the appellant was held liable, and not when the loan was released.*
>
> [21] With that, the Supreme Court of Canada pronounced 'that the judgment of the majority in *Kamloops* laid down a *general rule that a cause of action arises for the purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence.*

A [22] Likewise, in the instant case, the appellant on 1 September 1997 could not have discovered whatever negligence on the part of the respondents by the exercise of any reasonable diligence. Indeed, there was no reason for the appellant to suspect negligence, as effectively the respondents had advised the appellant that the charge was a valid charge. And the release of the loan only evinced that the appellant on 1 B September 1997 could not have discovered that something could be amiss about the charge. The earliest that it could be said that the appellant should have suspected possible negligence in the preparation of the charge was when the appellant was served with the writ of summons dated 24 May 2000. Only then could it be said that the appellant should have discovered that the charge was under challenge. On 28 October 2005, the appellant applied for leave to issue the said third party notice, C which leave was granted on 2 January 2006. On 20 January 2006, the said third party notice was issued. Evidently, the said third party notice was issued within six years from the date when the material facts on which the third-party notice was based ought to have been discovered by the appellant by the exercise of reasonable diligence.

D [23] We were invited to consider *Ambank (M) Bhd v Abdul Aziz Hassan & Ors* [2010] 3 MLJ 784 ...

[24] All except that in view of the aforesaid decisions of the apex court on the date of accrual of the cause of action, and the discoverability rule as espoused and or E endorsed in *Wardley, Central Trust,* and *Law Society,* we must respectfully decline to defer to the ruling that time would run regardless of whether damage was or could be discovered. (Emphasis added.)

[78] Hence, the Court of Appeal recognised and applied the principle of F knowledge or discoverability of the breach being material for the purpose of determining whether a cause of action had accrued.

[79] Likewise, the Court of Appeal in *Sabarudin bin Othman.* In that appeal, the plaintiff had claimed for monies due under loan facilities granted to the first G defendant where the second and third defendants stood as sureties under letters of guarantee. Default judgment was entered against the first and second defendants whereas the third defendant denied signing the letter of guarantee and documents related to the loan facilities. He counterclaimed for loss and damage incurred in defending the action. The plaintiff commenced third party H proceedings against seven third parties for an indemnity. The first two third parties were a legal firm appointed by the plaintiff to prepare the loan documents in 2002. The remaining third parties was another legal firm that attended to the documentation related to subsequent loan facilities. The third parties essentially argued that the claims against them were time-barred.

I **[80]** After a full trial, the High Court dismissed the claim against the third defendant after finding that the signatures on the letter of guarantee was indeed forged. As for his counterclaim, only the costs for signature verification was allowed. The High Court disagreed with the third parties on the issue of time

bar and the third parties (third party A and third party B) were ordered to indemnify and compensate the plaintiff for losses and damage suffered due to the forgery and the counterclaim.

[81] In substance, this decision of the High Court was affirmed on appeal for the reasons explained by Vernon Ong JCA:

> [23] We think that it is quite settled that the cause of action was complete when the damage was suffered and the guarantees were purportedly executed by the third defendant. However, whether actual damage has been established and if so, when, is a question of fact. Once that fact has been established then all the elements necessary to support the plaintiff's claim would be in existence in order to say that the cause of action had accrued; and prior to that point in time, there would only be a prospective loss and not actual damage which is necessary to support a claim for economic loss. Put another way, prior to the establishment of the fact that actual damage has been suffered, only a contingent liability existed and as such was not an actionable damage until the contingency occurred. No actual damage would be incurred until the contingency was fulfilled and the loss became actual, and until that happen the loss was prospective and might never be incurred.
>
> [24] In this case, in 2005 or 2007 the plaintiff could not have discovered whatever negligence on the part of Third Party B by the exercise of reasonable diligence, there was nothing to give rise to any doubt or suspicion as Third Party B had advised the plaintiff to disburse the loan sums to the first defendant on the basis that the guarantees had been duly signed by the third defendant. At the earliest, the plaintiff should have suspected possible negligence in the execution of the guarantees was when the third defendant filed and served his defence and counterclaim in May 2012. *Then and only then could it be said that the plaintiff should have discovered that the authenticity of the third defendant's signatures on guarantees were seriously disputed.* Accordingly, until the service of the third defendant's defence and counterclaim on the plaintiff it could not be said that all the facts have happened which are material to be proved to entitle the plaintiff to succeed in its third party claim. Indeed, it is quite settled that a cause of action normally accrues when (i) there is in existence a person who can sue and another who can be sued, and (ii) all the facts have happened which are material to be proved to entitled the plaintiff to succeed. Thus, in our view the period of limitation does not begin to run until there is a complete cause of action, and a cause of action is not complete when all the facts have not happened which are material to be proved to entitle the plaintiff to succeed (Lim *Kean v Choo Koon* [1970] 1 MLJ 158; *Credit Corporation (M) Bhd v Fong Tak Sin* [1991] 1 MLJ 409.
>
> [25] We have carefully considered the authorities cited by counsel and are of the view that the position of this court in *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* is to be preferred. Our view is also fortified by *Pang Yeow Chow v Advance Specialist Treatment Engineering Sdn Bhd* where Hamid Sultan Abu Backer JCA speaking for the Court of Appeal said in para [24]: 'The test really is whether or not the respondent could have initiated an action within the limitation period'.

[82] Thus, the Court of Appeal in *Sabarudin bin Othman* too, recognised

A and applied the principle of knowledge or discoverability of the breach as being material for the purpose of determining whether a cause of action had accrued.

[83] We, on our part, likewise recognise that same principle of knowledge or discoverability of breach with reasonable diligence as essential for establishing accrual of cause of action. Having said that, this area of the law has since been attended to by the new s 6A. On the facts of this appeal, the appellants themselves had been continuously misled and misrepresented the true facts by the respondents. If time ran from the date of preparation of the agreements especially the SPA, it is clear that even six years after that date, the appellants were in no position and could not have with reasonable diligence know that the SPA had errors or that the respondents were negligent in its preparation. It was not until they did their own search that the appellants found out about the charge. And, as mentioned earlier, inquiring with their solicitors about the status of the search would have been prudent and the most reasonable course of action or conduct that anyone similarly circumstanced would have taken.

[84] This reading and interpretation 'advances rather than retards' the accrual of cause of action 'within the bounds of sense and reasonableness' (per Lord Mance in *Law Society,* p 221). After all, that is ultimately the policy and intent of Act 254, to provide for limitations in civil litigation having balanced competing rights and interests of the respective parties.

[85] The answer to the second question is thus in the negative.

F CONCLUSION

[86] For the reasons explained, the appeal is allowed with costs and the decision of the Court of Appeal is set aside. The order and decision of the High Court is reinstated.

Appeal allowed; COA's decision set aside; and High Court's decision restored.

Reported by Ashok Kumar